Supreme Court of United States.

OCTOBER TERM, 1874.

PEYTON GRYMES, *Appellant*,
v.
GEORGE S. REPPLIER, &c., *Appellees*.
} No. 138.

Appeal from decree of Circuit Court of United States, for Eastern District of Virginia, rescinding a contract made by Appellant for the sale of his land.

CONWAY ROBINSON,
Counsel for Appellant.

November 17, 1874.

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STATEMENT OF THE CASE.

In the early part of 1866, the appellant was the owner of two parcels of land in Orange County. On one of these parcels, within a mile of Orange Courthouse, this gentleman, in his 76th year, was living; and his son, Peyton Grymes, Jr., was residing thereon with him and managing this farm for him, (p. 53). The other parcel was part of a larger tract called Vaucluse, (p. 102), about 24 or 25 miles from Orange Courthouse, of which, after the act of Virginia, of March 7, 1834, incorporating William K. Smith and others by the name of the Liberty Mining Company, (Sess. acts, 1833-4, p. 222), the appellant had, in 1843, conveyed 200 acres to Smith, and in 1852 conveyed 200 acres more to that Company, (p. , and pp. 33, 34). Upon the part sold to that Company,

a shaft sunk by the appellant was operated by him up to the time of that sale, and by that Company for sometime afterwards, but was entirely abandoned by them a considerable time before they stopped operations. (p. 12).

That part of the Vaucluse tract, whereof the appellant remained owner, (p. 98), and which is now in question, lies between the Melville and Greenwood gold mines, and is only about 365 yards from the latter, which is regarded as "extremely valuable" (p. 98). The owner of the Greenwood property thinks that the veins on it pass through the land in question, near to the dwelling house and on to the Melville property, (p. 98); and he is not alone in this opinion, (p. 43 and p. 105). The land in question has been supposed to be "a very valuable gold bearing property," (p. 99), and had, for many years, been worked for surface gold, with great success. See Edward Beale, p. 38; John R. Spotswood, p. 39; Joseph Embrey, p. 43; Peyton G. Hume, p. 49; Peyton Grymes, Jr., p. 58; William G. Williams, p. 60. But on it no shaft had been sunk—no vein developed. It had been operated upon only for surface gold, (p. 91), and Richard H. Catlett had heard nothing to lead him to believe that there was any shaft upon it, or that it had been worked otherwise than for surface gold, (answer to 18th question, p. 89), when he solicited an agency for the sale of it. Then the appellant told him that several parties had been looking at, and enquiring about it; and Catlett thinks he stated that he had received for it an offer, which he had declined (p. 87). The appellant would make no contract giving Catlett or his firm any legal or equitable title to the land (p. 84), but merely said, "that whenever Catlett would bring him $20,000, he would give him a deed for the land and allow him a commission on the amount." This, which was repeated on different occasions, (p. 57), was the only authority ever

given by the appellant to Catlett to sell said land, and was considered by the appellant not as an appointment of Catlett as his agent to sell, but rather as a promise made him, that if at any time before the appellant disposed otherwise of the land Catlett could make such arrangements as to enable him to pay down the sum of $20,000, less a commission thereon, the appellant would allow him to become the purchaser at that price, (p. 8.) Catlett did not even consider that he was to have such commission, his language being that he "was to receive as compensation what he could get over $20,000 for the property." (p. 86). In every other respect he confirms the language of the appellant's answer as to the arrangement. (See answer to 4th question, p. 86).

Howell Fisher and the appellee, Lanagan, were with Catlett on the way from southwestern Virginia to Lynchburg, when Catlett mentioned to them this as valuable property which he thought could be had at a low figure, and he was desirous that they should look at it. It did not suit Lanagan to go, but Fisher agreed to go, provided "he would not be detained over one day," (p. 26). Catlett says, "I wrote to Peyton Grymes, Jr., who is my brother-in-law, that we would be at Orange Courthouse on a certain day, to go to the property, and asked him to provide us some means of making the trip and to accompany us. I did not write to Dr. Grymes to accompany us, because his extreme age, in my opinion, totally unfitted him for the long and hurried ride which we anticipated." (p. 87). "I did not write to Peyton Grymes, Jr., because I thought that he had any authority of Dr. Grymes' property or to contract about it, but because I thought he was thoroughly familiar with the Vancluse property and could show it to us," (pp. 87, 88).

Peyton Grymes, Jr., son of the appellant, though his agent in matters connected with the management of the

farm on which he was living, with authority to sell the crops on it, was not his agent further or otherwise; he had no authority to sell or exercise control over any other property of the appellant, (p. 8 and p. 53). The appellant did not object to his son's (in compliance with Catlett's request) meeting Catlett and Fisher at the depot and carrying them to the appellant's land in the son's own carriage, drawn by his son's own mules, (p. 8 and p. 53). But he did not authorize his son, or any one, to act for him in showing the situation and boundaries of the land, nor did he ever designate any person as being able to point them out. Indeed he heard no suggestion that any one desired him to do so. (p. 8 and p. 53).

It being at a season when the days were short, it was dark when they got to the house of the tenant, Mr. Bullard. The house was crowded, but they got lodging, (p. 53). Among those then present at the house was Thomas C. Gordon, whose deposition is pp. 101, 102.

Peyton Grymes, Jr., says: (p. 53)

"That night, while we were at Bullard's, there was a good deal of talk (in which I took little or no part) about the value of the land as gold property. Mr. Bullard who had been living on it, and in the immediate neighborhood of it for several years, spoke very favorably of it, saying that a great deal of gold had been obtained by surface washing. Neither he or any one else in my hearing said anything about its ever having been worked for vein gold, or that there had ever been a shaft sunk upon it." (pp. 53, 54.)

On the other side Catlett is introduced. He is asked "was there any conversation in the hearing of yourself and Fisher, at the house the night you stayed there, about the gold-bearing qualities of the land?" And his answer is—

"The ladies at the house, inferring that we had come to examine the property, spoke of small pieces of gold which they had found on the hill near the house. They said that they had done this after heavy rains.

Not knowing much about the value of such surface indications, I was impressed with the confirmation which their statements afforded of the popular belief of the value of the property as a gold bearing property. I had always heard that it was an exceedingly rich and valuable property, and that Dr. Grymes had received a large amount of gold from it. I was pleased with the conversation, because I thought it confirmed statements which I had made to Messrs Lanagan and Fisher in relation to the property." (p. 88).

Edwin R. Johnson has for 22 or 23 years lived and been engaged in gold mining in that neighborhood. Being asked about the land in controversy, he says: "I know the land well and know that there has been gold found upon it, and a great deal of gold too, that is to say, surface gold, but it has never been worked for vein gold. The gold that I refer to as having been found on the land, was found by the defendant Grymes, and those working under him." (p. 53). This Mr. Johnson is referred to in the appellant's answer, p. 11, and the deposition of Peyton Grymes. He says, (p. 53).

"Before we got to the house, I told Catlett and Fisher that I did not know the lines of the land and proposed to send for a Mr. Johnson, who lived in the neighborhood and was well acquainted with them, that he might point them out, Fisher replied that he did not care to have them pointed out; that he only wanted to take a general look at the land and the character of the country. He said that he must get back to Orange C.H. to make the train going north at 12 or 1 o'clock the next day. It being 25 miles, and my mules slow, it was certain that we would have to make a very early start to accomplish it. I therefore did not send for Mr. Johnson, but for Peyton G. Hume, who was nearer than Johnson, and knew, as I supposed, enough about the land to give the general outlines (for he was then washing for gold upon it) and requested him to meet them early the next morning at an old abandoned shaft."—"We got up about light the next morning—I going to the stable to feed and gear my mules. Fisher and Catlett about the same time left for the shaft, where I had requested Peyton G. Hume to meet them. The reason that I designated the old shaft as the place for Hume to meet them was, because he lived some distance beyond it, and it was an intermediate point well worked so that they would not be apt to miss each other and thereby lose time, which was precious to us, as Fisher insisted upon getting back for the northern bound train. I had no idea that in designating that as the

place of meeting that it would convey the idea that it was upon the land of my father. For I knew it was not upon the land then belonging to my father, but was on that which had been previously sold by him; and if any question had been asked me about it, or if I had supposed for an instant that they thought it was upon the land then belonging to my father, I would, at once have informed them that it was not upon it. (p. 54).

On cross-examination (p. 59), he seems to think that the message he sent was to meet them at the shafts. He says, "I did not say particularly which one, and did not have in my mind this particular one any more than others, for there were two or three of them near each other, all of which were in the way that he would have to come on his way to the house where we stayed that night." Being asked as to the time that elapsed in the morning before he called Fisher and Catlett, he says, (p. 57), "I gave the mules a small feed of corn and geared them up while they were eating, and, I suppose it was about three quarters of an hour before I got to the place, where I called them. I don't think the sun was quite up when they got in the carriage to leave." In answer to another question he says: "they had to go some five or six hundred yards across my father's land until they got to Scott and Slaughter's line, across which was the shaft, not far from my father's line, some sixty yards, perhaps."—"They were not at the shaft when I saw them, but at some distance from it, on Scott and Slaughter's land, and seemed to be looking at other shafts upon it, for there were several on that land." He says (p. 54,) he waited in the road (nearly opposite the shaft) until they joined him, which they did almost immediately, and they at once started for Orange Courthouse.

Peyton G. Hume—grandson of appellant's wife—who was 33 years old, in 1869, (p. 44), deposes that the land in controversy, has been worked for surface gold by his grandfather and his agents as long as he can remember,

and as he has always understood, with very great success (p. 49.) He was, by his grandfather's permission, on this land in the summer of 1865, and until the summer of 1866, to wash for surface gold, and have all he could make in washing for it (p. 45); and was living in a house upon mining property adjoining. On the night of the arrival of Catlett and Fisher, with his uncle Peyton Grymes, Jr., he received a message from his uncle to meet them next morning near an old abandoned shaft. He went out early in the morning, before breakfast, and, meeting them in the neighborhood of the shaft, walked together to it, and Fisher took up several pieces of the old ore and looked at them. Very little was said by any body; they seemed to be in a great hurry, Fisher saying he would have to get back to Orange Courthouse in time to take the train that day. He don't think they had remained at the shaft more than two or three minutes, when Fisher and Catlett left and went out on the road to meet the carriage, in which they went away (p. 45). Having (in answer to the 3d question) stated that he was never at any time agent for Dr. Grymes, and was not at any time authorized by him to show the lines or to make any representations respecting the land to any persons whatever, and did not know accurately where the lines of the tract were, having only a general knowledge of them, he, in answer to the 5th question says, pp. 45, 46, as to Fisher and Catlett:

"Nothing was said by me or by them, or either of them in my hearing, about the lines of the land or about the shaft being upon it. They did not ask me any question about the shaft or the lines of the land, and if they had done so I could not have given them any certain information, for I did not know whether the shaft was upon the land or not, nor did I know the lines accurately. I know that my grandfather worked on that shaft when I was a boy, and know also that he had sold off part of the land, but did not know certainly whether the shaft was on the part sold by him or not, though I was under the impression that it was upon the land then owned by my grandfather."—"I know positively

that I never did represent that the shaft was upon the land, for if I had spoken about it at all, I would have said that I did not know whether it was upon the land or not, although I was under the impression that it was upon it."

Hume, in answer to the 17th question (p. 49), states that his washings were confined to old diggings and to material that had been washed over several times before; so that he was not successful in obtaining much gold, though he more than paid expenses. He had gotten from his own washings about as much as twenty pennyweight of amalgam a day, which was worth about seventy cents a pennyweight in gold. On cross-examination, being asked if he did not first show Fisher and Catlett the place where he had been washing gold, and then led them to the shaft, he answered (p. 50), "I met them at a point near the shaft, and that was about where I was surface washing for gold, and called their attention to the rocks, and Fisher examined it. I then led them to the shaft; the point that I first met them being some two or three hundred yards from the shaft." Being asked 'did you not know while they were there that the object of their visit was that Mr. Fisher should be shown the land with a view that he or some principal of his might purchase it,' the witness answers, (p. 50): "I so supposed, but was surprised that he saw so little and asked nothing."

Catlett, on cross-examination (pp. 88, 89), being asked, "Did you and Fisher, or either of you, go to any other shaft that morning besides the one about which the controversy has arisen,' answers: "I have an uncertain impression that Fisher and Hume went beyond this shaft; how far they went I do not know." Then being asked, 'Do you not recollect seeing some other shaft or shafts, or hearing something said about getting specimens of ore from another one, he answers, "I did not see any

other shaft in going to the shaft to which Hume carried us. We passed to the right of a mill house which had been used for crushing gold-quartz. It is probable there is a shaft near that. *There was a shaft beyond the one Hume carried us to, belonging to the Liberty Mining Company, or to Scott & Slaughter, from which Hume was to obtain some of the quartz for Fisher.*" As to this, Hume makes the following statement, (p. 109):

"I recollect that a request was made of me, while we were on the ground together, that I should obtain and send Fisher specimens of ore from a shaft or cut on land, which was then known by all parties not to be on the land then owned by my grandfather, Dr. Grymes; and that I did obtain and send Fisher several specimens (I may say a lot) of *ore from the lands adjoining the tract sold by my grandfather to the plaintiffs. and which Fisher knew did not come from the land sold to the plaintiffs.* I do not recollect distinctly who it was that made the request, but suppose it must have been Fisher; they were both together with me at the time it was made." "I am pretty sure that it was at Fisher's request."

Then Hume is asked, 'did Fisher or Catlett take with them, or request you to send them, any specimens of ore from the shaft you visited together, and about which this controversy has arisen?" And he answers thus:

"They took no ore, and did not request me to send them any from the shaft referred to in the question. While we were at the shaft Fisher took up and looked at several pieces of the ore, giving them a very hasty examination, and then put them down. I am sure that neither he or Catlett took any of it away with them, and that they did not request me to send, and that I did not send Fisher or any one else any of the ore from that shaft."

Peyton Grymes, Jr., states (p. 54) that he drove back to Orange Courthouse with Catlett and Fisher as rapidly as the mules could be induced to carry them, but did not reach the station until just after the train left. He then took Catlett and Fisher to his father's, within a mile of Orange Courthouse, where they remained until eleven o'clock that night, and took the next train which went north at twelve o'clock. Being asked, 'were you

at your father's house while Fisher and Catlett were there; and did you hear any one speak of the shaft in question, or of any shaft whatever, as being upon the land then owned by your father, or speak of it as having been ever operated upon except for surface gold,?' the witness (p. 55), makes this answer:

"I was at my father's house while they were there, but I went out to attend to my business on the farm soon after we arrived, and was not with them a great deal, but I was frequently in the house during the afternoon, and at night, and heard and took part in the conversation which was going on. I did not hear any one speak of a shaft's being upon the land, or of its ever having been worked except for surface gold, and it never occurred to me that Fisher, or any one else, supposed that it had been operated upon, at any time, for vein gold."

As to the nature of the conversation at appellant's house—while Fisher and Catlett were there—about the land as gold property, we have not only the statement of Hume, but also that of William G. Williams (pp. 59, 60) supporting the following passage in appellant's answer:

"Your respondent spoke of it as containing, to the best of his belief, an abundant supply of gold; saying, that including what he had done on the portions sold to Smith and the Liberty Mining Company, he had operated for gold on the land for some twenty-two years, and had realized very handsome profits, as could be ascertained by enquiring at the Bank of Virginia, in Fredericksburg, where he had made deposits, and at the mint in Philadelphia, where he had sold gold, and that specimens might be seen at the Patent Office, in Washington. Your respondent further stated that he believed that the land then retained by him was as rich in gold as either of the parcels of two hundred acres each that he had sold off from the original tract, and that he was satisfied in his own mind that there was more than one good vein upon it, although no vein upon that portion had ever been developed, he having operated upon it for surface gold exclusively."

He makes the further observation that what he did say "was wholly inconsistent with the idea that it had a shaft upon it; and, if Fisher really so believed when he came to the house of your respondent, he could not

have so continued to believe after what your respondent told him."

Very soon after Fisher's visit with Catlett, the land was visited by Mr. Harper, of Alexandria, accompanied by an old miner from California, who wished to purchase gold property. They expressed themselves as very much pleased with it; and when told that negotiations were pending with a view to its sale, said that if the sale was not effected, they would be glad to be informed of it, as the man from California was disposed to purchase it. They asked what the property was held at, and on being informed $20,000, seemed to think it a very reasonable price. (p. 57). The appellant wrote to Catlett, then negotiating in Philadelphia for its sale, (p. 87), that if he intended to do anything he had better act promptly, inasmuch as in the event of delay he might dispose of it to some one else. (p. 9). After Catlett's letter to Fisher, of March 12, 1866 (p. 91), and before the sale was consummated, Fisher visited Orange Courthouse, (p. 28), and brought there to William G. Williams, living at the Courthouse, and engaged in the practice of the law (p. 59), a letter from Repplier requesting him, Williams, to aid Fisher in examining the records and investigating the title to the land. (p. 60). Accordingly, Wiliams examined the records, together with Fisher. They had before them the will under which the appellant became entitled to the original tract, the deeds conveying 200 acres to Smith in 1848, and 200 acres more to the Liberty Mining Company, in 1852, and the plat made in 1865 by C. William Fry, of the remainder; and with this plat before him (which Fisher had also seen and examined on the occasion of his previous visit to the land, p. 56), Williams prepared the deed of the 21 of March, 1866, pp. 16, 17. And thus, as to the exact boundaries of the portion of land which had been sold, as well as of

what had been retained by the appellant, Fisher had the most ample opportunity to obtain information, before the appellant executed that deed of the 21 of March, 1866 (pp. 16, 17), and the power of attorney of the 27th of that month (pp. 5, 32, 33), authorizing Catlett to collect the purchase money, and before Catlett signed the receipt of the 7th of April, 1866 (p. 5), and before Fisher made his report to Repplier and Lanagan (pp. 28, 29, 31, 32), and before they executed their bond (p. 18).

Afterwards, Williams, the counsel of the vendees, prepared the paper of the 12th of April, 1866, pp. 107, 110. After saying to Peyton G. Hume "that Repplier and Lanagan wish you to remain on the property, as you have been doing for some time past, continuing your gold washing operations; they would prefer that you should occupy the house, if convenient, preventing the destruction or injury of the property," Williams refers to Catlett thus: "Dick says they are undecided as yet what they will do with it, whether they will put it in the market or operate on it themselves; hence cannot say how long they will wish you to remain and therefore want something like the above paper." The paper was accordingly signed by Hume, and is in these words:

"At the request of Mr Fisher, acting agent for G. S. Repplier and James Lanagan, of the State of Pennsylvania, I have this day taken possession of the land recently purchased by said Repplier and Lanagan, of Peyton Grymes, said land lying in the County of Orange and State of Virginia, and known as Vaucluse; to hold said land for them until they make other disposition of or arrangement concerning the same."

Hume was still engaged in washing for surface-gold when Repplier and Lanagan came to the land. He says: (p. 46.)

"They asked me to show them the lines of the land and also to take them to the shaft that Fisher and Catlett had been at. I told them that I did not know the lines, but suggested to them that they had best get Mr. Johnson, at whose house they were then staying, to go around with

them. Mr. Johnson accordingly accompanied us. We went to the shaft, they having expressed to me a desire to see it. When we got there they asked if that was the shaft that Fisher had seen; I told them that it was. Johnson told them that that shaft was not upon the land which they had bought, but was upon the land that Dr. Grymes had previously sold, and which was then owned by Scott and Slaughter. I stated that I was under the impression, although I did not know it to be a fact, that the shaft was upon the land which they had bought. Johnson said that he knew that it was not. They seemed to be surprised, and after examining a map of the land which they had with them, and having some private talk together, seemed to come to the conclusion that Johnson was right, and that the shaft was not upon the land which they had bought." "They then went to the house and examined the dwelling, and probably some of the out houses; they then went to where I had been surface washing and I made some pan washing for them, showing them the gold obtained by it. We returned then to Mr. Johnson's."

He is under the impression that they left the next morning; Repplier and his son, and (he thinks) another person who was with them, for Fredericksburg, and Lanagan for Orange Courthouse.

Thus it appears that of the fact that the shaft was not upon the land which Repplier and Lanagan had purchased, they were informed in the latter part of June or early in July, (p. 90). Yet they suffered months to elapse afterwards without taking any step to rescind the contract. Lanagan went to Orange Courthouse, but not to see the appellant. Although Williams "did not know or hear anything about his" (the appellant's) "being sick at that time" (p. 65), yet Lanagan did not see the appellant there or *in any way bring to his notice the propriety of rescinding the contract.* See Catlett's letter of July 13, 1866, p. 92, and depos. of Williams, p. 65. On the contrary, he went to Orange Courthouse for a different purpose—to buy horses. See depos. of Hume, p. 52, and of Williams, pp. 64, 67. And though he saw and conversed with Williams about the land, purchased some months previously by him and Lanagan, yet "nothing

was said about the shaft;" "he said nothing to produce the impression that he was dissatisfied or disappointed in any respect with the property after the examination that he had made of it." (p. 64) V. A. Houseworth, who saw Lanagan at Orange Courthouse says, p. 42, "he seemed to be very much pleased with the purchase of the land and said, he thought he would make money on it"—"he did not say anything about a shaft; nothing of the sort was referred to in the conversation between" them. So far from its being pretended that there was a mistake for which the contract ought to be rescinded, Repplier contemplated exploring the property (pp. 73, 74). Hume says: (p. 46).

"Before leaving, however, Repplier desired to know of me what arrangement he could make with me, by which they could have the property explored. I stated to them, in answer, that in consideration of a certain sum to be paid to me by them, I would employ labour, procure the necessary implements, and would make cuts for veins at several or as many points as they might think proper, they in the meantime to advance me the necessary funds to procure provisions, tools, &c., I accounting to them for all expenditures and disbursements, and receiving a sum for my own services, which, as well as I recollect, were to be two dollars a day. They (Repplier and Lanagan) assented to my proposition, and Repplier called upon Lanagan to know if he had any funds on hand, that they might be left with me, and finding that he had none that he could spare, Repplier stated to me that upon his return to Philadelphia, he would send me a draft to Fredericksburg. They directed me to get the hands, tools. &c., and go to work at once, and they would pay all the expenses; I agreed to do so, and they soon afterwards left the place." Further, he says, p. 47, "after the lapse of a few days, I went to Fredericksburg, expecting there to find the promised draft. Remaining there some days, and the draft not coming to hand, I telegraphed Mr. Repplier; whereupon, an answer from Mr. Repplier by telegraph, was received by me, stating that they had written to me or would write by that or the next mail. Another day, perhaps, elapsed, and the letter spoken of in the telegraph came to hand, in which Repplier stated that they had abandoned for the time their purpose to make explorations. I think the letter spoke of it as a temporary abandonment of the purpose only, though I am not positive about this. It may have said simply that they had abandoned it." (Hume adds, "This letter has been lost so that I cannot now produce it)."

A paper, in these words, "I have this day (21st July, 1866) turned over to Mr. Thomas C. Gordon the family house and farm of Vaucluse, to act as agent in charge of same for Messrs. Repplier & Lanegan, owners," (p. 111), was signed by Hume and handed by him to Gordon; and Hume, by letter to Repplier & Lanagan, informed them of what he had done. (p. 108). He made out his bill against them for his services and expenses, amounting to $17.50, for which he received a check, in a letter, dated July 26, 1866, (pp. 67, 68), and then he left the premises. (p. 47 and p. 109).

Howell Fisher, after mentioning that Repplier and Lanagan proposed he should go down and work the property and receive one-third of the net profits in addition to a salary, says, (p. 83), "when I told them that I could not go to take charge of the property, Lanagan said that they would not have purchased it had they not supposed that I would take charge of the property and manage it for them, and as I would not do so, they had better find a purchaser for it."

While Gordon was in possession as agent of Repplier and Lanagan, one of them (Repplier) for himself and the other, wrote the letter of Aug. 24, 1866, (p. 111), introducing to Gordon's acquaintance, Henry Bowman, Esq. (who had previously visited the property, p. 22 and p. 29), as a person who would attend to their interests in Virginia, and stating that any arrangements which Bowman might make with him, Gordon, regarding the same, would be agreeable to them. Notwithstanding the clear and distinct information which they had previously obtained as to the shaft, (in the conversation with Johnson if not before), they did not yet propose to rescind the contract; but sent Bowman to make investigations before attempting to get rid of the contract; desiring, it

would seem, to play somewhat of a one-sided game—hold on to the contract, in the hope of making it profitable, notwithstanding the locality of the shaft, and afterwards, if they should desire to do so, get rid of the contract because of that locality of the shaft. Of this there is evidence in Catlett's letter of Sept. 6, 1866 (p. 93), when he says to Repplier, "I saw Major Bowman in Orange and requested him to say to you, *in the event his investigations at Vaucluse did not prove satisfactory*, that I should be ready to coöperate with you fully, in effecting your wishes in the matter." After which he develops a plan of operations.

The vendees have taken Bowman's deposition (p. 29 to 31); but it is met by other evidence more distinct and clear and accurate. It appears that the plat made in 1865 by C. Wm. Fry, and which was before Fisher on his first visit, and was afterwards before Fisher and Williams together, had, without the assent or approbation of Dr. Grymes, been altered by Fisher. A point not marked shaft, and places not marked gold veins, upon the original, as it was when it passed from Dr. Grymes, were at a subsequent time marked as such by Fisher upon that original, or what purported to be a copy thereof; and his justification seems to be that what he so did was according to Catlett's recollection as well as his own of the locality of what he so marked. (pp. 28, 29, and pp. 78, 82). Catlett says, (p. 86), "I do not think that Mr. Fisher, who wrote the word 'shaft' upon the map and marked the spot, did so at the time we agreed as to its location. I have since seen the map with the word shaft written upon it. I do not know when it was written there." The plat, with the deposition of Peyton G. Hume, is spoken of by him at p. 50, and by Peyton Grymes, Jr., at p. 56. The latter being asked whether it appears to be a correct copy of the plat which he and Catlett and

Fisher had when they went to visit the land, answers thus:

"It does appear to be a correct copy in its general outlines, but, the one we had with us did not have upon it any of the lines marked in pencil as gold veins, and it did not have upon it anything to indicate that there was a shaft upon any portion of the land owned by my father. With the exception of the pencil lines, marks and words upon the plat now shown me, it appears to be a correct copy, in all respects of the plat we had with us; but that contained none of the pencil lines, marks or words that are upon the one now before me. The land belonging to my father consisted of two separate parcels; one of eighty-two acres, and the other of 318.70 acres, separated from each other by what is marked on the plat as 'Smith's Land,' and 'Old Vaucluse Mine.' The shaft about which this controversy has arisen is on the land marked upon the plat as 'Smith's land,' not far from the line of the 318.70 acres owned by my father; it has been abandoned for many years; I can't say how long."

Williams, also, is questioned as to the plat, with the deposition of Hume, and answers (p. 61) thus:

"The general outline of this map appears to be an exact copy of the one I had before me when I drew the deed. The only difference that I perceive is that this copy has upon it certain lines, words and figures, written with a pencil, which were not upon the original map when I drew the deed; and I think that a yellow line, with the words 'Old Vaucluse mine,' and passing over the letter I, was not upon the original map at that time. The map which was before me when I drew the deed did not contain any of the lines in pencil marked 'gold vein,' nor did it contain any mark of a shaft upon the 318.70 acre parcel of the land, of any other of the figures, words or marks that appear in pencil on the copy now before me."

Being asked as to when he next saw the map (or plat, or a copy of it) which was before him when he drew the deed, Williams (p. 61) answers thus:

"I think it was in the latter part of August, 1866, that I saw the map or a copy of it in the possession of Maj. Bowman, who came here as agent for the plaintiffs, to make explorations upon the land, to see if it contained veins of gold. Bowman came to me with a letter from Repplier, requesting me to give him any assistance which I could in the business upon which he was engaged. The map, as then shown me by Bowman, had upon it the pencil lines marked 'veins of gold,' and also the word 'shaft' as they appear upon the copy now before me. I do not

recollect whether the yellow line under the words 'Old Vancluse mine' was upon it or not. With the map, Bowman had a written description of the property as gold property. I told Bowman that the lines in pencil upon the map written 'veins of gold' were incorrect; that the gold veins in that neighborhood ran, as I was confident, in an entirely different direction, and Dr. H. D. Taliaferro, who was well acquainted with the land, told him the same thing. I did not read all of the description of the land which he had with the map, but I read enough of it to see that it appeared to be a very extravagant and high flown one, puffing the property greatly. The reason I didn't read it all was that Bowman did not offer to let me read it, and, indeed, I thought, was unwilling to do so when I was looking at it with the map to which it was attached."

The "very extravagant and high flown" description, is on p. 31, 32; and the evidence of Bowman's unwillingness for Williams to see it, is given by the latter on p. 66. 'Tis plain that, up to this time, rescinding the contract was not sought by Repplier and Lanagan, or Fisher, or Bowman, who expected to have an interest in the contract, (pp. 61, 62). Speaking of the interview between Bowman and the appellant, Williams says, (p. 62).

They had only one, which was at Dr. H. D. Taliaferro's house. I carried Bowman there to see Dr. Grymes; Bowman having expressed the wish to see him. The only persons present at the interview were Dr. Grymes, Bowman and myself. Bowman stated to Dr. Grymes that the shaft which was represented to Fisher as being on the land, had been ascertained not to be upon it. Dr. Grymes instantly replied that there was no shaft on the land that he had sold to Repplier and Lanagan, and that he had never represented to any one that there was a shaft upon the land, and that he had never authorized any one to make any such representation, nor did he know or have any reason to believe that any such representation had in fact been made by any one. Bowman insisted that such representation had been made, and that Repplier and Lanagan thought the shaft was on the land when they bought it. The Dr. repeated that he had never made such representations and had never authorized any person to make them."

The statements in Bowman's deposition (p. 31), being referred to, and a question in relation thereto being propounded to Williams, he replied (p. 63), distinctly, as follows:

"I know positively that nothing was said about the plaintiff's inten-

tion, in any contingency whatever, to decline to make the second payment for the land, or demand a return of the payment which had been already made by them. Bowman said nothing then, or at any other time, in my presence, from which it could be inferred that the plaintiff entertained any purpose whatever to rescind the contract of purchase. In referring to the shaft not being upon the land, he seemed to have no other object whatever in view but to obtain some abatement from the price of the land, and he went down to make the explorations without having succeeded in doing so. I know too that Dr. Grymes did not say to Bowman that he supposed the shaft in question was upon the land; he said the contrary, very distinctly, and more than once."

Thus it appears that the deposition of Williams gives full support to the appellant's answer (p. 11), both as to the fact of no shaft being marked on the plat, as within the boundaries of the land, sold to Repplier and Lanagan when that plat passed from appellant to Fisher; and as to the nature of the conversation between Bowman and the appellant. His son, Peyton, was then living at Woodley, a farm he had rented, about four miles from Orange Courthouse, in a different direction from the place at which his father lived (p. 65). Williams, speaking of the same evening on which he saw Bowman, makes this further statement. (p. 62.)

"That evening I carried Bowman out to Peyton Grymes, Jr., where Catlett was, and the shaft was again the subject of conversation, and I think that Bowman again said that a deduction ought to be made for it; but I did not hear all of the conversation between Bowman and Catlett. Bowman returned from Peyton Grymes, Jr., to Orange Courthouse that evening, and the next day went to the land in controversy, to make explorations for vein gold. He asked me to recommend to him persons to assist him in making the explorations. I recommended Peyton G. Hume and a man by the name of Johnson, an old miner, who lived near the property. He went to the land the next day."

At Bowman's instance, Hume went back to the premises, with the view of assisting him in making explorations for gold. p. 49. He came with Bowman, when he handed the letter to Gordon, p. 104, and remained there with him, aiding him in making such explorations as

long as he was engaged in making them. (p. 47). It was some ten days, or thereabout, that they were with Gordon, and making such explorations. (p. 102). The character thereof is stated by Johnson, p. 35, Embrey, p. 43, Hume, pp. 47, 48, and Gordon, pp. 104, 105. It appearing that Bowman was with Hume, night and day, the whole time he was there, slept in the same room, Hume is asked, did Bowman "say anything about the purpose of the plaintiffs to rescind the contract for the purchase of the land, because the shaft (which he, Fisher and Catlett were at, when Fisher visited the land), was not upon the land purchased by them, or did he say anything about their disappointment at finding that the shaft was not on their land? His answer (p. 49), is in these words:

"He did not say anything about the purpose of the plaintiffs to rescind the contract for the purchase of the land, nor did he give any hint that they contemplated anything of the sort; but, on the contrary, he gave me to understand that, in the event of the plaintiffs working the property, he expected to be sent back as their agent and superintendent. He did not say whether he expected the plaintiffs to work it permanently on their own account, or only to develop it fully as gold property, in order to sell it again; but all that he said indicated that he regarded them as permanent owners of the property, without any purpose to rescind the contract. I do not recollect that a word was said by him about the shaft in question; he certainly did not intimate any complaints or dissatisfaction on the part of the plaintiffs, on finding that the shaft was not upon the land."

The evidence of Gordon is similar. He says, (pp. 105, 106,) He did not hear Bowman "say a word about the shaft, and did not hear him say any thing from which" he "inferred that Bowman or the plaintiffs were dissatisfied with the contract of purchase, or had any idea of rescinding it for any cause whatever. On the contrary, he always spoke of the property as theirs, (the plaintiffs), saying that he was not sure whether they could work it themselves or would sell it. He said this

frequently, and he said further that if the plaintiffs concluded to work the property themselves, he would come back and manage it for them as their superintendent; but he said that he did not know whether they would themselves develope the property, with the view of working it themselves, or whether they would sell it. He said that the plaintiffs were wealthy men, large capitalists, and that they had bought the property on a speculation."

Bowman, when he got through with the explorations, and was about to leave, paid most that was due the hands, but not having money enough to pay all, there was a balance of $22.50, for which he sent a check of September 7th, 1866, (pp. 102, 103, 104, and p. 111). Gordon (p. 103) further deposes, as follows:

"When Bowman was leaving, after making the explorations referred to, he told me to remain in possession of the land as I had been doing, and take care of the place so as to keep it from being trespassed upon, or injured in any way, until I received written instructions from him or from Repplier and Lanagan, which they would send as soon as he got back to Philadelphia, and they determined what course they would pursue with the property; that he did not know whether they would go on to make further explorations for gold or would put the property on the market for sale, but that as soon as they determined what they would do with the property, I should be furnished with the instructions. After I had been left in possession of the property in this manner by Bowman, I found that there were persons in the neighborhood who seemed disposed to allow their stock to trespass upon it, and thinking that they might possibly question my authority to prevent trespasses, and wanting also to know, in connection with my own operations on the place and the length of time it was probable they would wish me to remain there, what course the plaintiffs intended to pursue with reference to the property, I wrote to Bowman, asking him to send me the letter of instructions he had promised. To this letter I received a letter from Bowman, in reply."

The purpose of the vendees to require a rescission of the contract was never announced to any one—not even to Catlett—until after Bowman had made his explorations for gold upon the land—never announced even to Catlett,

until September, 1866, (p. 90). According to Catlett's letter to Fisher of September 24, 1866, he (C) had just returned to Staunton, and found a letter from Repplier requesting him to inform Dr. Grymes that he should throw up his contract for the purchase of Vaucluse, and directing him to demand a return of the money, (p. 94). On the same day (Sept. 24, 1866), on which Catlett gave his views to Fisher, Bowman wrote to Gordon, in this cautious language: "I am directed by Mr. Repplier to say to you that he is not prepared to make any arrangements with you in relation to the Vaucluse property at present." Gordon says that either before or after this letter he received one other letter "to the effect that the plaintiffs were not prepared to give me any further instructions than those he (Bowman) had given me verbally on leaving the place, because they had not determined whether they would make further explorations for gold, or would put the place on the market for sale." Not receiving instructions in answer to the letters written by him to Bowman (to whom he wrote twice), Gordon wrote to Repplier himself, about the middle of October, making enquiry as to the course they intended to pursue and what they wished him to do, (pp. 103, 104), and received a reply from Repplier of the 20th of October, 1866, (p. 111), in these terms: "Having been deceived in the Vaucluse property, we have given it up. We must therefore, refer you to Dr. Peyton Grymes for answer to your questions contained in yours of the 14th inst." On receiving this letter, Gordon went to see Dr. Grymes, told him what Repplier had so written, and desired to know what he should do. "Dr. Grymes said he had no instructions to give him;" "That he had sold the place and it did not belong to him, and that he would have nothing to do with it." (p. 102).

Then there was further correspondence between Cat-

lett and Repplier (p. 33) in the same month, (Oct., 1866); Catlett, in reply to a letter of the 22d, having written one of the 25th, pp. 93, 94, mentioning "Dr. Grymes' letter to Mr. Repplier," (which the appellees have taken care not to produce), and saying to him, "I expect the best way to settle the matter between you and Dr. G. is for me to sell the property you bought from him, which I believe can be easily done." Catlett and Lanagan continued scheming and corresponding about this and other property until the spring of 1867. See Catlett's letter of Dec. 21, 1866, p. 95, mentioning to L., among other things, that he, C., had "not yet been able to return the money which you and Mr. R. so kindly loaned me;" and another of April 26, 1867, contemplating his going to Orange a day or two before Lanagan (p. 96) would get there, "in order to have a full and thorough talk with Dr. Grymes." Catlett is asked, p. 90, "Did not Dr. Grymes, as soon as he was told that they complained that there was no shaft upon the land, and ever since, so far as you know, say that he knew very well, and had always known that there was no shaft upon it; that he had never represented to any one that there was a shaft upon it or that he had ever worked it otherwise than for surface gold; and that no person had ever been authorized by him to make any such representations; and that if he had been informed that it was supposed that the shaft in question was upon the land he would, at once, have corrected the mistake?" And he answers, "So far as I know, your question covers the statements made by Dr. Grymes in substance to me." Being interrogated about the interview between Lanagan and Dr. Grymes, Catlett answers thus:

"I was present at that interview, and think it took place in the spring of 1867. At that interview Mr. Lanagan told Dr. Grymes, in substance, that not having gotten the property from him which they supposed they were buying, that they wanted the money refunded. Dr. Grymes

answered, in substance, that he did not have the money, having loaned it out, and given part of it away. In reply to this, Mr. Lanagan said that he did not care about the money and would give him any time he desired upon it. Dr. Grymes responded that he would think about it, and write to him or Mr. Repplier. After some conversation about other things, they parted. As far as I can recollect, this was what took place at that interview. *He made no admissions* that I heard that he made any misrepresentations, or that any was made by his authority, or with his knowledge, or that he was bound to rescind the contract of sale. The Doctor's manner was pleasant and so was Lanagan's, and I could but hope it would lead to a settlement between them."

While Catlett and Lanagan continued planning and corresponding, (see C's letter to L., of Sept. 21, 1867, p. 96), Gordon was living with his family, in the dwelling house on the farm. He remained there, keeping possession of the dwelling house, yard and garden, until Nov. 1867. (p. 102). Since the sale of the land, the vendor has never taken possession of it, or resumed any control over it. (p. 56).

And it was not until the 21st of March, 1868—after the value of the land had been materially impaired by the conduct of the vendees—that they filed their bill against the vendor and Catlett, praying that the contract be set aside; and that they may have a decree against the vendor for what they had paid, with interest thereon, and a lien upon the land to secure payment. (p. 1 to 5).

Answers are filed by the vendor (p. 7 to 15) and by Catlett (p. 19 to 21.) The vendor's answer denying all the material allegations of the bill is not disproved by the loose and inaccurate statements of the vendees in their depositions, (see Repplier, pp. 22, 23, Lanagan, p. 23 to 26, and 68 to 76), nor by the depositions of others. *Howell Fisher* is asked (p. 29) to state anything that he remembers showing that Dr. Grymes was sensible that he was under the impression that the shaft was on the land proposed to be sold. And he answers, "I don't remember anything; it was treated in our discussions as

an acceded fact, at least by me; the point was not mooted by any one. I, of course, did not call the doctor's attention to it because I was fully under the belief the shaft was on the property." As to supposed conversations, representations or statements of Peyton Grymes, Jr., there is some conflict between him (pp. 54, 55) and Fisher; and the statements of the latter should be viewed with caution. When his deposition was taken a second time, and he was speaking of conversation with Peyton Grymes, Jr., this witness (Fisher) said, p. 77, "there was no question at all as to whether the shaft was on the property, but was treated by us, in our conversation, as an acknowledged fact. The question was not mooted as to whether the shaft was or was not on the land." On cross-examination he says, p. 79, I don't remember to have heard anything about the shaft until that morning when we were taken there." Then being asked to repeat, as nearly as he can recollect it, exactly what Mr. Grymes said that morning, the witness says, "my impression is that he said Mr. Hume would show us the shaft, but of this I will not be certain. *My distinct recollection is that we were taken there. That is about all that I now distinctly recollect about it.*" And being asked 'if Mr. Grymes did say anything that morning about Mr. Hume's taking you to the shaft, was Mr. Hume present or within hearing of him when he did say so? the witness answers, "He was not. I did not see them together that morning." He is asked (p. 80) "Did Mr. Catlett ever profess to know anything about the matter (that is to say whether the shaft was or was not upon the land) except what he learned about it, when he and the witness were together, on the occasion of their visit to the land. And he answers unqualifiedly "No, sir, he did not; his knowledge was derived at the same time and from the same sources that mine was." *Richard H.*

Catlett, being interrogated as to his letters, p. 91 to 97, admits p. 85, that he may have in some cases, in the freedom of a letter, have stated *impressions and inferences* as facts, not being as careful in the language of a letter as he would be in a deposition." Thus, on being interrogated as to the letter of September 6, 1866, p. 92, mentioning Hume, he says, (p. 85) "I do not remember what transpired at the shaft or that he said a shaft was on the property; but from his having been sent for to go with us to show us the property, I took it for granted and felt certain that the shaft was upon the property, and left there under that conviction. That conviction I entertained until it was ascertained beyond question that a mistake had been made and that the shaft was not upon the property." Again, when interrogated as to the letter of September 21, 1867, p. 96, he says—(p. 88) "The language of the letter was not strictly accurate. As I have deposed, I do not remember what transpired at the shaft." In answer to the 17th question, p. 89, he says, "I do not recollect to have heard anything said after my visit to the shaft which was calculated to produce the impression on my mind that the shaft was upon the land or that the land had ever been worked otherwise than for surface gold, so as to lead me to the opinion that the shaft was upon the land, if I had not been carried to it by Hume." He is then asked "Did you at the time of your agreement to sell the land for Dr. Grymes, or afterwards before you were carried to the shaft by Hume, hear anything to lead you to believe that there was any shaft upon the land then owned by Dr. Grymes, or that the land then owned by him had ever been worked otherwise than for surface-gold?" And he answers, "I don't know that I did."

Not only is the vendee's answer not disproved by the evidence of the adverse party, but it is fully supported

by the witnesses that he has introduced. Yet the Circuit Court, on the 6 of April, 1872, decreed (p. 112), that the sale, in question, be set aside and annulled; that the bond for $12,500, executed for the deferred payment be delivered up for cancellation; that the appellant pay to the vendees $12,500, (the amount paid on account of the sale) with interest from the 7th of April, 1866, and the costs of the suit; and if the same shall not be paid, that the land be sold by commissioners appointed for the purpose.

From this decree, an appeal was allowed.

ASSIGNMENT OF THE ERRORS RELIED UPON.

I. The decree is erroneous in adjudging that the sale of land in the bill and proceedings mentioned, be set aside and annulled; that the bond for $12,500, be delivered up for cancellation; that the appellant pay $12,500, with interest and costs; and if the same shall not be paid, that the land be sold. Whereas, as the appellant insists, none of these things should have been decreed, but the prayer of the bill should have been denied *in toto* and the appellant allowed to receive the sum of $12,500, mentioned in the bond, with interest from the 7th of April, 1866, and his costs.

II. If the sale be set aside and payment required of the $12,500, with interest, then the defendant, Catlett, should be required to pay so much as he has received, to wit: $2,500, with interest from the 7th of April, 1866. (pp. 86 and 64).

BRIEF OF THE ARGUMENT.

1. " The plaintiffs' had paid their money, and accepted of the defendant his deed with a clause warranting the

title. For any defect in that title the law gave them a remedy by an action on the covenant. But, when declining to pursue that remedy, they apply to a Court of Equity to rescind the whole contract, thereby compelling the defendant to repay the sum of" $12,500, with interest, "and receive back the title which he had conveyed to the plaintiffs, the necessity of such a decree to obtain the ends of justice, must be very clear before it will be given." Such was the language of *Miller J.* in delivering the opinion of this court at Dec. T. 1872, in *Kimball* v. *West*, 15 Wallace, 379. And it is pertinent to the present case. For here there is no necessity for such a decree; the ends of justice forbid it.

The vendees have no right to be released from their contract, according to the principles stated by Ld. *Brougham*, in the House of Lords, in 1838. "We find the facts are wanting; we find there is no misrepresentation which gave rise to the contracts; we find that the purchasers did not rely upon the representation; but said we will enquire ourselves; that they began this treaty by saying we will enquire; and from the" day on which they first went to Vaucluse "downwards, they constantly proceeded upon the plan of satisfying themselves, first by sending their agents, then by going down themselves, then by enquiring themselves, then even afterwards by sending other agents to inquire" *Attwood* v. *Small*, &c., 6 Cl. and Fin. 497.

Upon the plaintiffs lies the burthen of proving that there were false representations; and that they acted on the the faith of them. *Jennings* v. *Broughton*, 17 Beav., 239. They have failed to show misrepresentation in any statement made or authorized by the defendant. S. C. 240; *Bartlett* v. *Salmon*, 6 De Gex, M. & G., 41; 39 Eng. L. & Eq., 495; *Hartopp* v. *Hartopp*, 21 Beav., 270; and it is not shown that they acted on the faith of such statement.

Upon what ground is a court of equity asked to decree that the contract be rescinded "in a case where," in the language of the vice-chancellor in 1847, (Sir *J. L. Knight Bruce*) "there is a total absence of unfair dealing, and where the peculiar doctrines of specific performance are entirely beside the question?" *Okill* v. *Whittaker*, 1 De-Gex & Smale, 89.

This is not a case in which the court will give relief to the party upon the ground of a mutual mistake. *Marvin* v. *Bennett*, 8 Parge, 321; *Thomas* v. *Bartow, &c.*, 48 N. Y., 198.

To justify the court in reforming an executed deed, it must appear that there has been a mistake common to both the contracting parties, and that the agreement has been carried into effect by the deed, in a manner contrary to the intention of both. *Murray* v. *Parker*, 19 Beav. 308. In 1853 the master of the rolls, (Sir *John Romilly*) fully concurred in the observation "that the burden of proof lies upon the plaintiff, and that this court, upon an application to reform an executed deed, looks at the evidence in a very jealous manner; and that it must be convinced that there has been a mistake on the part of all the parties executing the deed, before it will reform and alter the deed in any degree." *Wright* v. *Goff*, 22 Beav., 214; *Metr. Co. &c.* v. *Brown*, 26 Id., 462. This rule of equity—that to reform a deed it is necessary to show that the mistake was an error common to both parties to the contract—is alike recognized by the Ld. Chancellor. *Fowler* v. *Fowler*, 4 De Gex & Jones, 265; and the master of the rolls. *Bradford* v. *Romney*, 30 Beav., 438. The latter said in 1862 "when this court rectifies a deed on the ground of mistake, it must be upon proof of a mistake common to all the parties to the deed; you must show that they all made the blunder, and it must be

clearly proved." *Bently* v. *Mackay*, 31 Beav., 151; *Eaton* v. *Bennett*, 35 Id., 201.

Here no mistake has been committed by the vendor. He was not cognizant of error, before or at the time when the deed was executed and part payment made; and consequently is not seeking to take advantage of any error of which he was so cognizant.

No doubt there is a material difference between rectifying an agreement and rescinding it. But there is also a material difference between an application for specific execution of, and an application to rescind, a contract, especially an executed contract. When the application is to rescind an executed contract for land, and the allegation is not of fraud or *mala fides*, but only mistake, the mistake must be plain and palpable, and must affect the very substance of the subject-matter of the contract, *Thompson* v. *Jackson*, 3 Rand., 507; and the case must be such that the contract ought not in conscience to bind the complaining party. Here there is no such case. For that which is pretended by the bill to have constituted the chief consideration with the vendees for making the contract and the payment, did not, in fact, form the material ground of the adventure. *Jennings* v. *Broughton*, 17 Beav., 241. And whether it did or not the vendees were in no respect imposed upon by the vendor; and if the vendees failed to discover that which they pretend was material, it was because they failed to make use of their—or their agent failed to make use of his "eyes and understanding." And, "under such circumstances, after examination had, and a contract made in writing, which is made to bind the parties, it cannot be permitted that because the state of it turns out to be different from what was expected, the whole shall, at a future time, be rescinded." *Pickering* v. *Dowson*, 2 Taunt., 784. Though the law affords to every one reasonable

protection against fraud in dealing, yet "it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." 2 Kent's Com., 485. The fact on which the vendees ground their right to relief must be such as they could not by reasonable diligence get knowledge of. 1 Story's Equity § 146, 147. Whereas here, the sources of information were open to the plaintiffs; and if they were mistaken it was because they or Fisher, their agent, drew erroneous inferences from the imformation he obtained. *Jennings* v. *Broughton*, 17 Beav., 241, 242; S. C. 5 De Gex M. & G., 136. As was said in 1859, by the Lord Justice *Turner*, "the existence of the plaintiff's claim can be attributed only to his own neglect." *Campbell* v. *Ingilby*, 1 De Gex and Jones, 405. *Accord. Garrett* v. *Burleson*, 25 Texas, 44.

There was before the Queen's Bench in 1871, a case wherein "the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats, according to the sample. The buyer persuaded himself they were old oats when they were not so; but the seller neither said nor did anything to contribute to his deception." *Cockburn* C. J., said: "He has himself to blame." *Smith* v. *Hughes*, L. R., 6 Q. B. 603. *Hannen* J., added that "one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party." S. C., 609. In vain was it argued that the defendant intending to buy old oats and the plaintiff to sell new, the two minds were not *ad idem*; and consequently there was no contract. *Cockburn*, C. J., said: "This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him

to buy with one of the essential conditions of the contract."—"All that can be said is that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them." S. C., 606. Even, therefore, if a motive operating on the vendees to induce them to buy the land was the belief on their part that a certain shaft and vein were within the boundaries of the land, yet this is immaterial when it is not an essential condition of the contract. "On the sale of a specific article, unless there be a warranty making it part of the bargain, that it contains some particular quality, the purchaser must take the article he has bought, though it does not possess that quality." *Blackburn*, J., in S. C., 607.

A right to rescind a contract is often waived by accepting a deed. *Comparet* v. *Hughes*, 6 Blackf. 417. In the present case, "there is no mistake in drawing the deed. It was drawn strictly in accordance with instructions given" by the vendees or their agent to the draftsman. If there was any mistake at all, "the whole mistake was in the judgment of" the vendees or their agent, "as to the effect of the purchase," *Durant* v. *Bacot*, 2 Beasley (New Jersey Ch. R). 204, 205. They did not require or ask or expect the deed to contain a warranty making it part of the bargain, that a certain shaft and vein were within the boundaries of the land conveyed; the land remains their's though the shaft and vein are not within those boundaries; and there is no case for the interference of equity.

The real state of the case is believed to be that the plaintiffs embarked in this scheme with their eyes open, knowing all that was then to be known, but with an exaggerated and undue expectation of success, and that they have since fallen into the opposite extreme. *Jennings* v. *Broughton*, 17 Beav., 244. They purchased with the

full knowledge that they were embarking in a speculative concern, and the intention to do so. It may be that incited by the prospect of large gains, they acted too hastily. S. C., 5 De. Gex., M. & G, 140. But they are not entitled after embarking in speculations to convert these speculations into certainties at the expense of their vendor. This would be the effect of giving them the relief which they ask; and therefore, their bill should be dismissed. S. C., 5 De. Gex., M. & G. 140.

II. If there were any ground of objection under ordinary circumstances, the subsequent transactions (narrated in this brief from p. 12 to p. 19) completely prevent the vendees from raising it in this case. *Thomas* v. *Bartow*, &c., 48 N. Y., 200. As the vice-chancellor Sir *George James Turner*) said in 1852, "If the purchaser had meant to insist on this objection, he ought to have raised it at once, and stated it as an objection on which he ment to rely; and not having done so," "the objection, if any it be, must be taken to have been waived."—"A purchaser knowing of an objection of this description to the validity of a contract, cannot lie by and afterwards attempt to avail himself of it. The instant that such an objection comes to the knowledge of a party, he is bound immediately to insist upon it, if he intends to rely on it at all. He cannot at one time treat the contract as subsisting and then afterwards turn round and say there never was any contract." *Flint* v. *Woodin*, 9 Hare, 622; 41 Eng., Ch. R., *Jennings* v. *Broughton*, 5 De. Gex., M. & G. 139.

A man must choose between different and inconsistent rights and cannot assert one after he has deliberately elected to enforce the other. *Lloyd* v. *Brewster and others*, 4 Paige, 537; *Saratoga & Schenectady, R. R. C.*, v. *Row. &c.* 24 Wend, 74; *Minturn* v. *Main*, 3 Selden, 220; 7 Rob. Pract., Ch. 26 § 2, p. 432. Hence, even supposing the

facts to have been such that the vendees might at one time have elected to avoid the contract, yet it being shown that after knowledge of such facts, they, by unequivocal acts, affirmed the contract, their election is determined forever. Id., p. 433.

III. Principles, well established, both at law and in equity, are contravened by the decree when it rescinds the contract, and does not and cannot put the parties in *statu quo*. Ld. *Ellenborough*, C. J., in 1804, says: "Here was an intermediate *occupation*, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done, and the lease executed, and yet not rescind the contract, why might he not rescind it after a twelve-month on the same account. This objection cannot be got rid of; the parties cannot be put in *statu quo*." The language of other judges is equally pertinent. *Le Blanc*, J., said: "The plaintiff voluntarily consented to go on upon the contract after the defendant had made the default, of which he wishes to avail himself in destruction of the contract. But the parties cannot be put in the same situation they were in, because the plaintiff has had an *occupation of the premises under the agreement*." *Hunt* v. *Silk*, 5 East, 452, 453; cited in *Minturn* v. *Main*, 3 Selden, 227.

Such is the present case. For here there has been occupation under the conveyance, and it would be impossible to restore the vendor to the situation in which he was, before that conveyance was executed. *Okill* v. *Whittaker*, 2 Phill, 340, 22 Eng., ch. R; and payment made of part of the purchase money. For the vendor on receiving that money had a right to consider it as his without dispute; he spent or otherwise disposed of it in confidence that it was his and perhaps now may not have the means of repayment. A decree against him for

it is most unjust. *Brisbane* v. *Davies*, 5 *Taunt*, 144, 1 Eng., C. L; *Andrew* v. *Hancock*, 1 Brod. & Bingh., 37, 5 Eng., C. L., *Skyring* v. *Greenwood*, 4 Barn. & Cress, 289, 10 Eng., C. L; 2 Rob. Pract., ch. 41, § 7, p. 471. Moreover the language of *Jennings* v. *Broughton*, 5 De. Gex. M and G., 139, is entirely apposite. If the relief prayed by this bill be granted, how are the defendants to be compensated for the loss which they may have sustained by not having been placed in a position to sell to other persons who might have been well content to abide the risk, from which the plaintiff desires to shrink? What has been already said on p. 10 of this brief, based on what appears in the record on p. 57, and p. 9, is further supported by Williams, according to whom (p. 65), "there was, in the winter and spring of 1866, very considerable inquiry for mining and mineral properties of all kinds by northern capitalists;" and there were "several sales in Virginia at high prices." He says "this state of things continued until the summer or early fall of that year, since which time there has been little or no inquiry for property of that kind," and he has "heard of but few sales."

Edwin R. Johnson, is asked at p. 36, to "state what would be the effect upon the market value of land as gold bearing property, of its being publicly known that a professed miner like Bowman had made explorations upon it and had not found gold, without its being known at the same time how imperfect those explorations really were," and he answers "it certainly would injure the sale of it very much." And other witnesses concur; see John R. Spotswood, p. 41; Peyton G. Hume, p. 48. Moreover there is proof of careless, perhaps it might be said, wantonly negligent conduct on the part of the vendees which has caused serious dilapidations. *Phillips* v. *Silvester*, L. R. 8 Ch. app. cases, 179. The value

of the land for agricultural purposes is impaired. Edward Beale, being asked, in 1869, "what is its condition and value now, compared with that in 1866, when the plaintiffs took possession of it," answers p. 38, "I consider that it has been injured in value by from twelve to fifteen hundred dollars since the year 1866, when they took possession of it. This injury has been caused by the destruction and pulling down of buildings on the place; the making of roads in various directions across it; the bad cultivation of the land, it being suffered to grow up in bushes and briars, and being generally neglected." The deterioration in value is also deposed to by John R. Spotswood, p. 40, and Thomas C. Gordon, p. 106. The latter says, he does not think the place "would now sell for any think like as much for farming purposes, merely, as it would have brought at the time it was sold by the defendant to the plaintiffs."

IV. Inasmuch as upon the preceding grounds the prayer of the bill should have been denied *in toto*, it is deemed unnecessary to say anything more on the second error assigned than that it is insisted on unless its consideration should be rendered unnecessary by the decision on the first error assigned.

CONWAY ROBINSON,

Counsel for Appellant.

November 17, 1874.

Supreme Court of United States.

OCTOBER TERM, 1876. *NO.* 7.

PEYTON GRYMES, *Appellant*
vs.
GEORGE H. REPPLIER, &c., *Appellees.*

Reply to Brief of Appellees.

As to much of what is said in the appellee's brief of argument, (pp. 6, 7,) it may be sufficient to observe that this appeal is governed by the act of March 3, 1803, (2 Stat., p. 244,) and the decisions thereupon; that by this act it was provided that "upon such appeal, a transcript of the bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court;" that "in this manner the court obtained that full possession and control of the case which the nature of an appeal implies," (20 Wall., 625;) that "no one ever supposed that when the court came to consider the judgment which it should render on such an appeal it was to be governed by the principles applicable to writs of error at common law;" "but the uniform course has been to consider it as a case to be tried *de novo* on all the considerations of law and of fact applicable to it." (Id.)

The language of this court in *Kimball* v. *West*, 15 Wall., cited at pp. 27, 28 of appellant's brief, and remarked upon at p. 8 of appellee's brief, accords with that of elementary writers. "With some few special exceptions, a purchaser, after the conveyance is executed by all necessary parties, has no remedy, at law or in equity, in respect of any defects either in the title to or quantity or quality of the estate which are not covered

by the vendor's covenants." 1 Dart's Vendors and Purchasers, p. 711 of 4th Lond. ed.

In the present case, whether the contract be regarded as executed or only executory, the bill to rescind it cannot be sustained.

The defects complained of were *patent*, and could have been discovered by a vigilant man. Sugd. on Vend., 14th ed., pp. 2, 3. "Cases are of daily occurrence in which the doctrine of *caveat emptor* is to apply, and parties are left to take the consequences of their own want of caution or prudence. A court of equity will only interfere with this doctrine of the common law in those cases in which it is proved that one party has made a representation of a material circumstance which he knows to be a falsehood, and the falsehood of which the other party has no means of knowing, and in which it can be further shewn that the contract which it is sought to set aside was founded upon this misrepresentation so made and in reliance of the facts so misrepresented." *Attwood* v. *Small, &c.*, 6 Cl. & Fin., 338.

Numerous cases concur in supporting the conclusion that upon the facts shewn in this record—which it is insisted are more accurately stated in the brief of the appellant than in that of the appellees—a court of equity is not authorized to rescind the contract. *Hunter* v. *Goudy and others*, 1 Ham., (Ohio,) 451; *Buck, &c.*, v. *McCaughtry*, 5 Monroe, 221. As was said by the Supreme Court of Connecticut in 1835, there is not discovered "any fraud or misrepresentation on the part of the" vendor, nor any mistake on the part of the "vendees, except mistaken calculations and an unprofitable bargain." They were "not taken by surprise; it was not a hurried transaction. On the contrary, time was taken, advice was obtained, and a deliberate opinion formed." *Segar* v. *Tingley*, 11 Conn., 144. In analogous cases it was considered in New Jersey in 1837 that if mistake was made by the complainant, "he must suffer the loss in conse-

quence of that mistake;" *McKelway* v. *Cook*, 3 Green's Ch. R., 115; and in Mississippi in 1843 that the complainants "must be held to abide by their own judgment"—that "the rule of *caveat emptor* applies." *Halls* v. *Thompson*, 1 Smedes & Marsh., 481. The Supreme Court of Maine, in 1844, said that "when the buyer acts without being influenced by any statements of the vendor, and in a case where there is unavoidably much of uncertainty, and in a speculation which for aught that could be predicted might turn out very advantageously, or very much otherwise, we cannot deem any error into which the buyer might fall, in his calculation upon his profits, to be an adequate ground for rescinding his engagement, either in whole or in part." *McCobb* v. *Richardson*, 24 Maine, (2 Shepley,) 88. And the Supreme Court of North Carolina said in 1845 that "where each party is equally correct and there is no concealment of facts, mistake or ignorance is no foundation for equitable interference." *Crowder* v. *Langdon*, 3 Iredell's Eq., 486.

The grounds on which the decree in *Small, &c.*, v. *Attwood, &c.*, Younge, 407, was reversed equally require a reversal here. For in the present, as in that case, there is not proof of such a statement of facts as is required to found thereupon a charge of misrepresentation. *Attwood* v. *Small, &c.*, 6 Cl. & Fin., 332; and, 2dly, even if the vendees did rely upon anything said by the vendor or any authorized agent of his, they are not, under the circumstances of this case, entitled to be released. For, according to the Earl of Devon:

"If a party engaged in negotiating for a purchase of property, and having employed competent agents to inspect that property, either does not call for or obtain any report from those agents, or, having got such report, does not act upon it," "he cannot afterwards turn round and say that he has been deceived by placing reliance upon the statements of the vendor instead of availing himself of the means of information which were open to him." S. C., 6 Cl. & Fin., 335, 336. According to Lord *Brougham*, "the party must not only have been minded to overreach, but he must actually have overreached. He must not only have given

instructions to the agent to deceive, but the agent must, in fulfillment of his directions, have made a representation; and, moreover, the representation so made must have had the effect of deceiving the purchaser; and, moreover, the purchaser must have trusted to that representation, and not to his own acumen, not to his own perspicacity, not to enquiries of his own." S. C., 6 Cl. & Fin., 444.

In the present case, as in *Attwood* v. *Small*, 6 Cl. & Fin., 344, the whole course of the proceeding tends to shew that the purchasers "resolved to examine and judge for themselves." As in *Haywood* v. *Cope*, 25 Beav., 148, 149, the evidence shews that the vendees contracted, not on the faith of representations of the vendor or of any agent of his, but on their own opinion and that of others employed by themselves.

As stated in the appellant's brief, pp. 11, 12, Fisher, the agent of the vendees, had the most ample opportunity to obtain information before the deed of March 21, 1866, (pp. 16, 17 of Rec.,) and before that agent's report to the vendees, (pp. 28, 29, 31, 32 of Rec.,) and before they paid the $12,500 mentioned in the receipt, (p. 5 of Rec.,) and executed the bond (p. 18 of Rec.) for the other $12,500. These papers plainly shew what was the intention, and that no doubt existed in the mind of that agent or in the minds of the vendees themselves with reference to the meaning of the contract. They shew the same, none the less, because of the circumstance (appearing at p. 6 of Rec.) that the deed was deposited as an escrow, to be delivered upon payment of the last instalment of the purchase-money. *Hayward* v. *Cope*, 25 Beav., 147.

At the request of Mr. Fisher, acting agent for the vendees, P. G. Hume took possession of the land to hold for them, (pp. 107, 110); and he was engaged in washing for surface gold when they came to the land. (P. 46.)

To their subsequent course the observations of the Master of the Rolls in 1858, are very pertinent. He remarks;

"That the subject matter of this contract is a mine—that is to say, seams of coal which may turn out better or worse and is always in some degree, a speculation. It may turn out better, or it may turn out worse, and it is well known that leases and sales are always made with reference to this circumstance."—"Whether seams were to improve or to deteriorate was a matter which could only be ascertained by the future working. They have turned out ill, but the consequence of that is not, in my opinion, that the defendant can reject the contract, any more than the plaintiff could have rejected it, or have demanded higher terms, if the seams had turned out profitable." *Hayward* v. *Cope*, 25, Beav., 149.

The pretension as to the shaft (at which Fisher and Catlett had been,) even if it would otherwise have had any ground to rest upon, must be overthrown upon the principle that a party who thinks he has been imposed upon, gives up his right of objection by dealing with the property after his discovery of such imposition. *Campbell* v. *Fleming, &c.*, 1 Adol. and El. 41; Sugd. on Vend. ch. 8, § 4, clause 25, p. 335, of 14th ed. In 1838 the Lord Chanceller, (Ld. *Cottingham*,) speaking of the fault in the mine then in question, said:

"Whether the fault has been endeavored to be concealed, whether there has been any such concealment as would vitiate the contract and purchase between the parties, it is not at all necessary at this time to enquire, because the ground on which my noble and learned friend disposes of that part of the case appears to be quite clear, that whatever was known to the parties must have been known to the purchasers early after their possession, which was in the month of November, and it is quite impossible, with the knowledge of that defect in the month of November, *the purchasers going on dealing with this property not as an ordinary estate*, which may be restored at the end of six months, in the same state in which it was, *but a property of this description, varying every day*, that they can set up such an objection at the end of six months, when they must have known the fact from the commencement." *Attwood* v. *Small*, &c., 6 Cl. and Fin. 357.

CONWAY ROBINSON,
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[In consequence of information from Mr Stanton, one of the counsel for the appellees, that there would be an additional brief on their part, the printing of the foregoing reply was deferred as long as it could well be done, in order to notice in it such additional brief. But that was only received to-day, when this reply was on its way to the printing office, and when it was too late to write any addition and have it printed before the probable time for the oral argument. C. R.

OCTOBER 6, 1876.]